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In the

Supreme Court of the United States

October Term, 1948

Nos. 103, 104

FRANK LOBAIDO, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

On application for certiorari to the Supreme Court of the State of Michigan.

Brief opposing Petition for Certiorari

I

Opinions of Courts Below.

We accept counsel's statement in relation to the opinions of the courts below.

II

Counter-Statement on Jurisdiction.[1]

1. It is our position that the Court lacks jurisdiction because the petitioner did not make application for a writ of certiorari within 3 months after the entry of the judgment of the recorder's court of the city of Detroit (the trial court), or within 3 months after the entry of the final order of the Supreme Court of the State of Michigan (the appellate court); nor did he apply for an extension of such time, nor did a Justice of the Court grant an extension within such time. 28 U.S.C. § 350.

The following jurisdictional steps of procedure were taken in the trial court and in the Supreme Court of the State:

May 1, 1946, after the jury had found petitioner guilty (2) of the two offenses charged in the information,[2] the trial court imposed sentence (2).

May 17, 1946, the petitioner filed a motion for new trial on substantially the same grounds as those presented in his application for leave to appeal (2).[3]

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[1] Numbers in parentheses, unless otherwise indicated, refer to pages of the printed record; numbers preceded by 'Tr.' refer to pages of the typewritten transcript; numbers preceded by 'P' refer to the petition for certiorari.

[2] The rape of a 7-year-old girl, and, contemporaneously, an assault upon her, by slitting her throat, with intent to murder.

[3] This motion for new trial was filed within the time limit prescribed by Michigan Law. Mich. Code of Criminal Procedure, chap. 10, § 2 (3 Comp. Laws Mich. 1929, § 17356; Mich. Stat. Ann. § 28.1099).

Dec. 24, 1946, the trial judge denied the foregoing motion.

Oct. 9, 1947, petitioner filed (122) in the state supreme court his application for leave to appeal (80-122), based on a concise statement of facts and proceedings (1-61) certified (80) by the trial judge.[4]

Jan. 13, 1948, the State Supreme Court denied (123) petitioner's application for leave to appeal.[5]

Feb. 10, 1948, counsel for petitioner filed (123) with the clerk of the State Supreme Court a document styled 'Motion for Reconsideration of Order denying application for Leave to Appeal'.[6]

Feb. 17, 1948, the Supreme Court of Michigan denied (123) such motion for reconsideration, without opinion, and entered in its journal an order to that effect.

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[4]

Mich. Court Rule 60. Cf. Mich. Code of Criminal procedure, chap. 10, §4 (3 Comp. Laws Mich. 1929, § 17358; Mich. Stat. Ann. § 28.1101).

[5]

We should state at once our contention that when the court immediately below denied petitioner's application for leave to appeal on the 13th day of January, 1948, its order became the final judgment of that court within the meaning of 28 U.S.C. § 350, and that the prescriptive period of 3 months within which petition for certiorari might be filed in this Court began to run on that date.

[6]

There is, so far as we can ascertain, no constitutional, statutory, or inherent power to grant such a motion. And, if it applies, Court Rule 71 (Michigan) provides that applications for rehearing must be made within 20 days from the filing of the opinion. Here, the petitioner waited 28 days before applying for reconsideration.

The following procedural steps were taken in this Court:

May 10, 1948, upon order of Mr. Associate Justice Reed, and upon consideration of the application of counsel for petitioner, the time for filing petition for writ of certiorari in this cause was extended to the 17th day of June, 1948; and such a petition was filed within that time limit.[7]

2. It is further our position that no federal questions of substance are presented by the petition for certiorari, and that all questions presented to the trial court and to the Michigan supreme court were decided on adequate and independent nonfederal grounds. And, since this Court possesses no supervisory authority over the courts of the State of Michigan, jurisdiction in this cause is lacking.

III

Questions Presented

First: Was the petition in this cause filed within the period of time prescribed by law?[8]

Second: Does the petition present federal questions of substance:

(a) Is there any merit to petitioner's claim that substantial denial of cross-examination prevented a fair trial?[9]

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[7]
It is our position that the order extending time was entered after the time period had already expired.

[8]
28 U.S.C. § 350.

[9]
Petition for certiorari, pp. 18-21.

(b) Or to his contention that the conduct of the prosecuting officials prevented a fair trial?[10]

(c) Or that the attitude of the trial court prevented a fair trial?[11]

(d) Or that the destruction of the scientific evidence by the Detroit police department precluded a fair trial?[12]

(e) Or that petitioner was denied due process by Michigan's failure to protect against, judicially inquire into, and correct alleged improper influences which are claimed to have 'gravely contaminated the jury trial, resulting in a tribunal essentially unfair'?[13]

(f) Or that the Supreme Court of Michigan denied equal protection of the laws in refusing to grant appeal?[14]

Third: Were the questions now presented in their federal aspect, decided by the courts below on adequate and independent nonfederal grounds?

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[10] Petition for certiorari, pp. 21-23.

[11] Petition for certiorari, pp. 23-24.

[12] Petition for certiorari, pp. 23-24.

[13] Petition for certiorari, pp. 24-27.

[14] Petition for certiorari, pp. 28-30.

IV

Counter-Statement of the Case.

Counsel's statement of proceedings is substantially correct except that he refers to the 'Concise Statement of Facts and Proceedings' upon which petitioner under Michigan Court Rule 60, Sec. 2, applied to the court below for leave to appeal, as 'so-called'. Since the statement was certified (79-80) by the trial judge, although it may be lengthy, it is authentic and cannot be impeached.[14a]

We accept, for the present purpose, counsel's statement of the facts, although we deem it necessary to correct a few inaccuracies and omissions (Supreme Court Rule 27, par. 4):[14b]

1. It is said, petition, p. 7, that the horrible nature of the crime aroused public indignation to a point probably unequalled in the history of Detroit; that from January 27, 1946, until commencement of the trial on April 8, 1946, and throughout the trial which terminated on April 25, 1946, the case received newspaper and public attention to an ex-

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[14a]

Under Michigan practice (Rule 60), after a lengthy trial hotly contested by competent and capable defense counsel, reported in a transcript covering over 2600 typewritten pages, it is not surprising that opposing counsel on each side of the controversy would find difficulty in preparing and accepting a concise statement agreeable to the prosecution and the defense. Especially when, as here, a new prosecutor has come into office a few days after denial of the motion for new trial.

[14b]

Our position is, of course, that all questions of fact and the credibility of the witnesses, as well as the value of certain segments of the testimony referred to in counsel's statement, were exclusively for the jury.

tent unique in the annals of Michigan jurisprudence (126). Such a statement is merely a substantial quotation from paragraph 5 of petitioner's motion for reconsideration of the order denying leave to appeal. The extent of the publicity involved in this case does not appear of record. If it does then it must appear in the motion for continuance, a copy of which has not been served on the solicitor general.[14c]

2. In footnote 3, petition, p. 8, counsel refers to a statement said to have been made by petitioner to the prosecutor 'after the second consecutive night without sleep' (34, 35; Tr. 2115).

It should be added, we respectfully suggest, that since petitioner claims no denial of due process because of the use of a confession or extra-judicial statement taken under coercion, this statement should be disregarded.

3. On page 14 of the petition, counsel states that 'it therefore seems reasonably clear that taking the scientific evidence together it establishes' certain facts set forth by him. This, we submit, is merely argumentative. Analysis of the facts was for the jury under proper instructions from the bench.[14d]

[14c]

A copy of the motion for continuance is not included in the printed record. We consented to the granting of petitioner's motion to dispense with printing of the record of the trial court (1-2), and petitioner's counsel was considerate in supplying us with a copy of the transcript of trial (2643 pages), but there is not available for us at the present time a copy of the motion for continuance.

[14d]

We do not choose at this time to enter into a lengthy discussion or analysis of the facts, for these, after all, were for the jury.

V

The Argument

Point One

The petition in this cause was not filed within the period of time prescribed by federal law.

The Congress has provided, that no writ of certiorari intended to bring any judgment or decree before this Court

> "shall be allowed . . . unless application therefor be duly made within three months after the entry of such (final) judgment. . . . For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court."[15]

If petitioner's application is for a review of the final judgment of the court of original jurisdiction, *i.e.*, the sentence imposed upon him, then such judgment was entered on the 1st day of May 1946. Under decisions of this Court, presently cited, the finality of that judgment was suspended from time to time: (1st) by a *timely* motion for new trial filed (2) on the 17th day of May 1946 and denied (2) on the 24th day of December 1946; (2nd) by a *timely* application for leave to appeal (80-122) filed (122) in the Michigan Supreme Court on the 9th day of October 1947,[16] and denied (124) on the 13th day of January 1948.

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[15] 28 U.S. C. § 350.

[16] Although the record does not disclose the fact, we are assuming for the present that the concise statement of facts and procedure required by Michigan Court Rule 60, was prepared, served and filed within the time therein prescribed.

It is our position that, under the laws of the State of Michigan, which this Court will recognize and honor, the judgment of the trial court became final on the 13th day of January 1948 when the highest court of the state denied appeal; that the 3-month period of time prescribed in § 350, Title 28, U.S.C., as amended, therefore expired on the 13th day of April 1948; that, under the laws of Michigan, presently considered, the motion for reconsideration of the denial of leave to appeal, filed (123) in the State Supreme Court on the 10th day of February 1948, was unauthorized and did not operate to suspend the final judgment of the trial court, or to toll the federal law; and that therefore the order of this Court, entered May 10, 1948, extending the time for filing petition for certiorari (131) to June 17, 1948, was made after the Court had lost jurisdiction.

If petitioner replies that the Supreme Court of Michigan, in denying (129) his motion for reconsideration of the order of January 13, 1948, did not decide the question of power and authority to entertain such a motion, we respectfully suggest that the court below should first be given opportunity to do so before this Court makes final disposition of the pending application for certiorari.

1. In Michigan, the right to appeal from a conviction in criminal proceedings, is purely statutory and does not exist in the absence of a statute,[17] 'and review for error, not raised in accordance with the statute and rules of practice is not a right of the defendant, although such a review may be, but seldom is, granted in the discretion of the su-

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[17]

Gillespie, Mich. Criminal Law & Procedure, Vol. I, § 641, p. 759, citing: People v. Yund, 163 Mich. 504; Crary v. Judge, 197 Mich. 452; People v. Price, 244 Mich. 643; Att'y Gen'l v. Lane, 259 Mich. 283, 287 U.S. 654.

preme court'.[18] While the right of review is statutory, the procedure is subject to court rules,[19] and the legislature has declared that the practice established by court rules for the exercise of appellate jurisdiction, shall prevail over the statutes.[20]

Michigan Court Rule 60 (1945), therefore, controls. Section 2 thereof provides in substance that to obtain leave to appeal to the Supreme Court, the appellant shall within the time limited for taking an appeal as of right (except when delayed appeal is sought),[21] (a) prepare an application for leave to appeal in accordance with the provisions of the rule (unnecessary to be recited here); (b) serve copy thereof on the opposite party with notice of prompt settlement of the concise statement on which the application is based; (c) that objections to the proposed concise statement shall be settled by the judge; (d) file with the supreme court; (e) file a supporting brief.

Section 3 (a) thereof provides as follows:

"(a) In cases where timely appeal requires leave, application for *delayed* (emphasis ours) appeal shall be

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[18]

Id., Vol. I, § 641, p. 760, citing People v. Yund, supra.

[19]

Id., Vol. I, § 642, p. 760, citing Att'y Gen'l v. Lane, supra.

[20]

Mich. Code of Criminal Procedure, chap. 10, § 14 (3 Comp. Laws 1929, § 17368; Mich. Stat. Ann. § 28.1111); In re Widening of Woodward Avenue, 265 Mich. 87.

[21]

An appeal of right shall be taken within 20 days after filing proof of service on opposing counsel of notice of entry of judgment, or within 20 days after entry of order denying new trial. Mich. Court Rule 57, § 1.

made as above provided and, in addition, shall affirmatively show, by affidavit of facts, that the delay was not due to appellant's culpable negligence. Any party may file affidavits in opposition thereto".

Once such an appeal has been denied by the supreme court, there is no provision by rule or otherwise, so far as we have been able to find, for a motion to reconsider the order of denial or the application for leave to appeal.

2. Court Rule 71, of course, establishes the procedure for an application for rehearing in the supreme court; but that rule applies only to calendar causes submitted to and decided by the court on their merits; and it is very strict in prescribing the time within which such motions may be filed:

> "Sec. 4 (Rule 71): No application for rehearing will be considered by the Court unless the moving party shall, within 20 days from the filing of the opinion therein, cause any papers upon which it is based, together with his reasons for granting the same, to be printed, and 24 copies thereof to be filed with the clerk of this Court, and a copy thereof to be served upon the counsel for the opposite party. Proof of this service shall also be filed with the clerk. The party opposing may, within 10 days thereafter, file with the clerk 24 copies of his objections to the application, either printed or typewritten, as he may prefer; the Court will then examine the papers, and without further argument, unless specially ordered, will pass upon the application".

Petitioner was denied leave to appeal, on the 13th day of January 1948, and he filed his motion for reconsideration on the 10th day of February 1948. Twenty-eight days

elapsed. Hence, under Rule 71, § 4, *supra*, he was just 8 days too late, assuming that the rule permits such a motion to be filed at all.

But the rule does *not* apply to applications for leave to appeal, and it is manifest that under Michigan law the judgment became final on the 13th day of January.

We realize, of course, this Court has held that a **'timely'** petition for rehearing tolls the running of the three months' period within which a petition for certiorari to state courts may be presented to this court, because it operates to suspend the finality of the state court's judgment pending such court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties;[22] that a motion for a new trial, *seasonably* made, suspends the running of such time; but in the absence of any such motion or of some proceeding of which the court has jurisdiction, and *seasonably* filed, the Court is powerless, after the period within which an appeal can be applied for, to extend the time fixed.[23]

Although we must concede there are few opinions on the subject, and although there seems to be some thought to the contrary,[24] reason and common sense require that in circumstances such as these the three-month prescriptive period should not be considered to have been tolled or sus-

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[22]

Department of State Banking, State of Nebraska, v. Pink, 317 U.S. 264; rehearing denied, 318 U.S. 802.

[23]

Chicago etc. R. Co. v. United States, 54 Ct. Cl. 116.

[24]

See, e.g., United States v. Seminole Nation, 299 U.S. 417.

pended when the petitioner filed his motion for reconsideration of the order denying appeal. Unless the rule is rigidly enforced, a litigant could prolong the time within which he may apply for a writ of certiorari from this Court, an indefinite number of days or years by moving the state court to reconsider its final judgment or order.

We, therefore, respectfully submit that the petition in this cause was not filed within the period of time prescribed by § 350 of Title 28 of the U.S.C., and that this Court is without jurisdiction.

Point Two

The petition for writ of certiorari does not present substantial federal questions.

We respectfully submit that the petitioner's several claims of denial of due process, lack merit or substance. This is merely one of those cases in which an accused person has been tried by jury in a state court of competent jurisdiction, with the aid and assistance of highly competent and experienced counsel possessing marked ability, and has been convicted of a heinous offense.[25] The trial judge gave due consideration (for seven months) to petitioner's motion for new trial; and the highest court of the State, after carefully considering the defendant's numerous as-

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[25]

Two offenses arising out of the same criminal transaction, viz., statutory rape, and assault with intent to commit murder, were charged in the information (1-2), and the jury found petitioner guilty of each. No point is made here that the two counts were multifarious or inconsistent, although it was raised below.

signments of error,[26] denied him an appeal. Although he clothed many of these assignments in language indicating a claim of denial of due process, we respectfully submit that the questions raised could be decided on nonfederal grounds.

In short, what counsel in his commendable zeal is attempting to do is to persuade this Court to take upon itself the task and the duty of supervising state courts in the conduct of criminal proceedings, for if he is correct in supposing that a writ of certiorari should issue in a case such as this, then we would have to admit that state courts are incompetent to deal with such situations; and that every error committed by a trial court is a denial of due process. This Court, we believe, would be most reluctant to take such a position.

It is our position, therefore, that the several questions here presented for consideration as federal problems, may be somewhat summarily treated:

(a) Is there any merit to the claim that a substantial denial of cross-examination prevented a fair trial?

Counsel argue, petition, pp. 18-21, that since the petitioner was convicted largely through the testimony of the victim, a girl 7 years of age, subject to the vivid imagination of a child of her years, since her testimony indicates a brilliant mentality 'which, in a child of seven years, enhances the dangers of imagination and fancy', and since there were many inconsistencies in her testimony, it was essential to a fair trial that petitioner be allowed the widest scope of

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[26]

Such assignments, approximately 65, cover 42 pages of the printed record (80-122).

cross-examination. 'Without it', counsel urges, 'a judicial proceeding could be nothing but pretense', p. 19. Then, having cited several examples, he contends that substantial denial of cross-examination prevented a fair trial. No cases are cited, except *United States v. Keown*, 19 F. Supp. 639, a district court decision which merely stated the common-law rule that 'every accused person has the right to cross examine on material facts every witness who testifies against him', a rule constituting a part of due process.

1. It is doubtful to us whether this question was clearly and plainly raised in its federal aspect in the courts below. Counsel's 9th assignment of error in his application for leave to appeal, reads:

> "Because the court erred in limiting the defense counsel's cross-examination of the prosecutrix, on April 17th, 1946, . . . on the theory that said cross-examination was repetitious, whereas counsel was merely laying the ground work for impeachment, and so advised the court" (112).

There is definitely no claim here (as in other such assignments) that such an error was in contravention of the defendant's constitutional right to a fair and impartial trial, or to due process of law.

2. Under the laws of the State of Michigan it is the duty of the judge

> "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved".[27]

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[27] Mich. Code of Criminal Procedure, chap. 8, § 29 (Mich. Comp. Laws 1929, § 17322; Mich. Stat. Ann. § 28.1052).

The supreme court of that State has held repeatedly that the trial judge is necessarily vested with considerable discretion in the reception of testimony, and that the scope of cross-examination is also within his sound discretion, *People v. Hoffman*, 142 Mich. 531.

Where the defense is conflicting, and it is manifest that certain witnesses on one side or the other have testified falsely, the manner of examination of witnesses and the general conduct of the trial must necessarily be left to the discretion of the trial judge.[28]

As a recognized authority on Michigan criminal procedure has well said:[29]

> " . . . The trial judge is not a mere figurehead. He is charged with directing important public business. The atmosphere of the trial court cannot be carried into the appellate court, nor can the conditions which move the trial judge be displayed in the printed record".

It is here complained that the trial court denied due process when he refused to allow counsel for the defense to repeat certain questions asked a 7 year old girl. Of such a general situation it has been stated:[30]

> "The court has the right to go to some lengths where there is a continual repetition of questions, to compel

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[28]
Gillespie, I Michigan Criminal Law and Procedure, § 465, p. 574, citing People v. Hoek, 169 Mich. 87.

[29]
Id., § 465, p. 574, People v. Hoffman, supra, 142 Mich. 531.

[30]
Id., § 465, p. 574, citing People v. Whitney, 105 Mich. 622.

counsel to desist, and this is a matter which the judge has a right to control in the orderly conduct of the business of the court".

We respectfully submit, after reading counsel's admirable presentation of this point, that there is nothing so shocking to one's sense of justice in the trial court's rulings on the scope and manner of cross-examination of the prosecutrix, as to warrant the conclusion that the petitioner was denied a fair trial or that he lost his liberty without due process of law.

(b) Or to his contention that the conduct of the prosecuting officials prevented a fair trial?

Counsel's contention here is based largely on alleged prejudicial remarks of the prosecuting attorney and his chief assistant during the course of the trial. There are certain inconsistencies in this argument. While it is said that the case was tried 'in the throes of sensationalism probably unique in Michigan's history' (126), and that 'newspaper publicity was so extreme as probably to be without parallel in the state's history' (126), counsel states with commendable frankness that the jury was confined during the course of a trial lasting 17 days including the holiday season of Easter and he opines that the jurors were thereby rendered impatient (forgetting their sworn duty as citizens); and he intimates that the prosecutors capitalized on the extreme excitement and prejudice.

We have carefully read the remarks on which counsel predicated his assignments of error, and, without repeating them, we respectfully suggest that the situation disclosed is merely one to be expected in the trial of a criminal cause where experienced, capable and competent counsel are engaged in conflict.

"Great care should be taken by prosecuting officers and trial courts, that no statement be made in the presence of the jurors which might jeopardize the defendant's right to a fair trial. But, in the haste and zeal of a trial, it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made to determine whether impromptu remarks are prejudicial. Statements should not be held prejudicial if they are made in good faith, and, when fairly construed, do not appear to have been such as to have influenced the jury adversely to the rights of the accused".[31]

Or, putting it another way:

"While the duty is cast upon the prosecuting attorney of seeing that the defendant has a fair trial, he is not required to be supine, nor is he required to apologetically present the people's case. He is entitled to display a reasonable amount of vigor, and, unless he transgresses the rules of conduct his position as a public officer requires, he should not be condemned by the court".[32]

It will also be found in many of the instances cited by counsel that the trial judge, when objection was offered to alleged prejudicial remarks made in the heat of trial, admonished counsel to refrain therefrom, or ordered the remark stricken. This cured the error, if any, we respectfully submit.

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[31]
Gillespie, Mich. Crim. Law & Pro., Vol. I, § 488, p. 596.

[32]
Id., p. 595, citing People v. Nemer, 218 Mich. 163; People v. Burnstein, 261 Mich. 534.

(c) Or that the attitude of the trial court prevented a fair trial?

It is contended, petition, pp. 23-24, that the attitude, remarks and conduct of the trial court, as shown by the record, 'are subject substantially to the criticism directed against the prosecuting officials, and denied petitioner due process by rendering a fair trial impossible'.

Again reference is had to the alleged 'extreme public excitement, tension, and pre-judgment of petitioner', and it is urged that petitioner's motion for a continuance should have been granted (2, 113, 127).

Unfortunately, perhaps, the motion for continuance is not published in the printed record, but be that as it may we respectfully submit that sensational press coverage of a crime of this nature is not of itself sufficient to justify the adjournment of a trial unless there is further evidence of actual public hostility. And the same principle has been applied to applications for change of venue.

> "People in this country do not take for truth, everything that is published in a newspaper. The jury well know that they are to be governed only by the evidence and the law".
>
> *State v. Norris,* 2 N.C. 429; 1 Am. Dec. 564.[33]

Moreover, under Michigan law,[34] 'the trial of criminal cases shall take precedence over all other cases' and

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[33]

Annotations on the subject will be found in: State v. Gordon, 32 N.D. 31; 155 N.W. 59; Ann. Cas. 1918 A, 442, at 449; State v. Rasor, 168 S.C. 221; 167 S.E. 396; 86 A.L.R. 1237, 1249.

[34]

Mich. Code of Criminal Procedure, chap. 8, § 2 (3 Comp. Laws 1929, § 17295; Mich. Stat. Ann. § 28.1025).

'no adjournments, continuances or delays shall be granted by any court except for good cause shown'; even adjournments by consent of counsel for the prosecution and accused is proscribed unless in the discretion of the court it shall clearly appear by sufficient showing that the reasons for such consent are founded upon strict necessity 'and that the trial of said cause cannot be then had without a manifest injustice being done'.

And under the decisions of her highest court,[35] the continuance of a criminal trial lies within the sound discretion of the trial judge; the burden is on the party claiming abuse of such discretion to show it; and prejudice to a defendant in a criminal prosecution must be apparent or proved to have been at least probable.

In the case at bar, the prejudice or lack of prejudice on the part of prospective jurors was sifted out on voir dire examination, which is the accepted practice in Michigan.[36]

As the Supreme Court of Michigan has well said:[37]

> "Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light of

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[35]

People v. Williams, 118 Mich. 692; People v. Burby, 218 Mich. 46; People v. Crawford, 218 Mich. 125; People v. Raider, 256 Mich. 131; People v. Schneider, 309 Mich. 158.

[36]

People v. Swift, 172 Mich. 473, 481; People v. Burns, 242 Mich. 345, 350; People v. Raider, 256 Mich. 131, 134; People v. Schneider, 309 Mich. 158, 163, 165.

[37]

People v. Schneider, 309 Mich. 158.

evidence given under oath; and it is now a well-settled rule that a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially according to the evidence, and the court is satisfied he will do so''. From 24 Cyc. 298.

Counsel also complain that throughout the trial the judge, without justification, sharply reprimanded petitioners' counsel for acts required by professional duty, and that he repeatedly made remarks and evidenced an attitude toward counsl which must have had the effect of conveying to the jury that counsel was merely wasting everybody's time (96-103).

It will be noted that the criticism which the trial judge leveled at defense counsel was that he repeated questions on cross-examination, over and over and over again. We think the criticism, given in the mildest terms, was quite justified (96-103). And we find in the record no objection or complaint of such remarks.

Colloquys of this nature between court and counsel are not unusual in the trial of causes, 'and especially in criminal causes, and the average juror knows and understands it. He does not charge up against the client all the unpleasant things that may be said to counsel'.[38]

We respectfully submit the attitude of the trial court did not prevent a fair trial.

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[38]

Gillespie, Mich. Criminal Law & Procedure, § 462, p. 570; citing People v. Kimbrough, 193 Mich. 330.

(d) Or that the destruction of the scientific evidence by the Detroit police department precluded a fair trial?

Destruction of such evidence may have been careless, but there is no evidence of a deliberate intent to deprive the accused of due process of law, as in *Mooney v. Holohan*, 294 U.S. 103, where it was contended that the prosecution was based on perjured testimony known by the prosecuting officials to be perjured. For, if counsel is correct, any negligence of a police officer in the handling of such exhibits would preclude the prosecution of any accused involved in such a situation.

It is our thought that the credibility of the expert witnesses was for the jury, and that the destruction of the exhibits by one of the witnesses bore merely on such credibility.

(e) Or that petitioner was denied due process by Michigan's failure to protect against, judicially inquire into, and correct alleged influences claimed to have contaminated the jury?

1. We respectfully submit the nylon stocking episode is too trivial for this Court's serious consideration, and we do not propose to dwell upon it.

2. Counsel for the defense moved the court to declare a mistrial on the ground that a newspaper article to the effect that petitioner had confessed may have come to the attention of the jury and unduly influenced them (18-20). The answer is, we think, that the jury were segregated during the trial; that every reasonable precaution was taken to isolate them from outside influences (19); that when counsel for petitioner directed attention to the pub-

lication of the newspaper article, the trial judge inquired of the jury (20, Tr. 910) whether anyone of them read anything in the daily press; whether they heard anything outside of the testimony taken from the stand about the case; and whether anyone of them heard anything that might prejudice anyone of them in their deliberations. None of the jurors answered that he had; one of them (we presume it was the foreman) answered 'No'. We cannot agree with counsel that the officers should have been interrogated. The matter, we think, lay within the discretion of the trial judge, and he handled a difficult situation admirably.

We respectfully submit the trial court was not dissolved when this episode occurred.

(f) Or that the Supreme Court of the State of Michigan denied equal protection of the laws in refusing to grant appeal?

Appeal in Michigan is a matter of judicial discretion, and in criminal cases it is not one of right (see footnotes 17, 18, 19, and 20). The court below in this case carefully examined and considered petitioner's application, just as it examines and considers hundreds of such petitions during the course of a year.

We respectfully submit there is nothing in this record to indicate that the Supreme Court of Michigan denied equal protection of the laws in refusing to grant appeal.

Point Three

Questions now presented in their federal aspect, were decided by the courts below on adequate and independent nonfederal grounds.

The questions presented to the court or original jurisdiction were, we respectfully suggest, decided on adequate, indepent nonfederal grounds.

As we have observed in this brief, when discussing each question raised in the petition for certiorari, the trial court in its proceedings was guided solely by well-established Michigan law, both statutory and judicially declared.

Without needless repetition, we invite the Court to consider that in Michigan the scope of cross-examination lies within the trial court's discretion; that the trial judge has control of court proceedings and in exercise of such power supervises the conduct of counsel; that the remarks of the court made during the course of trial, of which counsel now complain, were merely necessary in pronouncing judgment on objections raised by either side; that the result of the careless destruction of scientific evidence was for the jury's appraisal, and the question is governed by the rules of evidence; and that the other matters discussed in the petition for certiorari were those which lie within the sound discretion of any trial court.

We, therefore, respectfully submit that the questions presented were decided by the courts below on adequate and independent nonfederal grounds.

VI

Conclusion.

We respectfully submit, with all due respect for the zeal of counsel, that the petitions for writs of certiorari to the Supreme Court of the State of Michigan and the trial court, should be denied.

Respectfully Submitted,

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